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87-236

NO._____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GORDON MCLEAN CAMPBELL, PETITIONER

V.

THE BOEING COMPANY, RESPONDENT

ON PETITION FOR CERTIORARI TO THE

WASHINGTON STATE COURT OF APPEALS

DIVISION I

PETITION FOR WRIT OF CERTIORARI

Gordon McLean Campbell

Petitioner

1631 Belmont Avenue

#208

Seattle, WA 98122

QUESTIONS PRESENTED FOR REVIEW

A. Whether, under the holding of Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976), construing 49, Appendix U. S. C. #1506, the savings clause of the federal aviation program, the trial court had jurisdiction over the subject matter of a complaint seeking an injunction and alleging that, in order to avoid the hazard of falling planes in Seattle where plaintiff lives, defendant should be required to notify the crews of planes to be sold by defendant which fly over Seattle of a new explanation for the movement of the air according to which the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will. (The new explanation presents the possibility that the air could, by intelligent, controlled, voluntary movements, shift

the path of a plane or even force it down to earth.)

B. Whether, under the holding of Nader v. Allegheny Airlines, Inc., 426 U. S. 290, the doctrine of primary jurisdiction was applicable where, on a motion to dismiss, the allegations of the complaint were undenied and a suit for injunction within the conventional competence of the courts was involved and the only question presented regarding the new explanation for the movement of the air was whether the crews should be instructed about said explanation.

C. Whether, under the holding of Nader v. Allegheny Airlines, Inc., the doctrine of primary jurisdiction was applicable where there is no statute or regulation about the new explanation for the movement of the air.

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OPINIONS BELOW

No opinions of the courts below were reported.

JURISDICTION

The ruling of the commissioner of the court of appeals of the state of Washington division one sought to be reviewed was dated and entered on March 4, 1987.

The order of the court of appeals of the state of Washington division one denying motion to modify commissioner's ruling was dated and entered on April 1, 1987.

The order number of the Washington state supreme court denying petition for review was filed on June 2, 1987.

Jurisdiction in this court is based upon 28 U. S. C. #1257(3).

Petitioner believes that the decision sought to be reviewed conflicts with 49, Appendix U. S. C. #1506.

STATUTES

49, Appendix U. S. C. #1506

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

STATEMENT OF THE CASE

Petitioner filed suit seeking an injunction. The complaint reads as follows:

> In the Superior Court in and for the county of King, state of Washington
>
> | | | |
> |---|---|---|
> | Gordon McLean Campbell, Plaintiff |) | No. 86-2-64846-4 |
> | v. |) | |
> | The Boeing Company, Defendant |) | Plaintiff's Complaint for Injunction |
>
> The plaintiff alleges as follows:
>
> I
> Plaintiff
> Plaintiff is a citizen of the United States and a resident of Seattle, Washington.
>
> II
> Defendant

Defendant is a corporation engaged in the building and sale of airplanes with principal offices in King County, Washington.

III

Seattle activity

Many airplanes built by defendant daily fly over Seattle. These airplanes are flown without the crews thereof being informed of a new explanation for the movement of the air which directly relates to the operation of the airplanes. Many people in Seattle are also unaware of the new explanation of the movement of the air.

IV

The new explanation for the movement of the air

The new explanation for the movement of the air is that the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will.

V

Effect of the new explanation

The possibility the air is alive presents the possibility that the air, by intelligent, controlled, voluntary movements, could cause the airplane to shift its path. Also presented is the possibility that the intelligent air could use movements of the air as signals to the crew regarding the aircraft's flight.

VI

Resulting hazard

Plaintiff's life is endangered by the fact that the crews of the airplanes, referred to in paragraph III hereof, are not notified of the new explanation for the movement of the air, since this lack of information increases the risk of falling airplanes in Seattle.

VII

Conditions precedent

All conditions precedent have been completed.

Prayer

Wherefore, plaintiff asks that defendant be ordered, in future sales of airplanes, to include an instruction to the crews of the existence and nature of the new explanation of the movement of the air.

Dated this 17th day of March, 1986.

s/Gordon McLean Campbell

Gordon McLean Campbell,
Plaintiff
1631 Belmont Avenue
#208
Seattle, WA 98122

Respondent moved to dismiss and to strike the complaint basing the motion, among other bases, upon the trial court's lack of jurisdiction of the subject matter. (defendant's motion to dismiss and to strike complaint)

In defendant's memorandum in support of motion to dismiss and to strike complaint, respondent contended that the federal aviation administration had authority over these matters and that the doctrine of primary jurisdiction deprived the court of jurisdiction of the subject matter.

In plaintiff's brief in opposition to defendant's motion to dismiss and to strike complaint, petitioner contended that the trial court did have jurisdiction over the subject matter under 49, Appendix U. S. C. #1506, the savings clause of the federal aviation program. This statute preserves existing common law and statutory remedies.

Petitioner contended that the complaint set forth a common type of suit for injunction to prevent the hazard of falling objects and that courts have usually had jurisdiction over this type

of case. Therefore, petitioner contended, the court had jurisdiction of the subject matter notwithstanding the doctrine of primary jurisdiction.

Petitioner further showed the trial court that, prior to bringing suit, he had petitioned the U. S. secretary of commerce for issuance of a rule regarding the new explanation for the movement of the air. (affidavit of Gordon McLean Campbell) The petition, he stated, was referred to the transportation department who at first denied jurisdiction. Later, he stated, the federal aviation administration declined to issue a rule.

Petitioner alleged that the new explanation was unknown to the crews of planes sold by defendant which fly over Seattle. (Plaintiff's complaint for injunction) Petitioner thereby showed that there was no statute or regulation regarding the new explanation.

The trial court passed upon the contentions of the parties by entering an order granting motion to dismiss and strike complaint. The order did not include reasons for the decision.

Petitioner filed appeal directly to the Washington state supreme court. The brief of appellant, brief of respondent and reply brief of appellant were filed.

After the briefs were filed, the Washington supreme court transferred the case (including the record) to the Washington court of appeals, division one for determination.

The court of appeals set the case for hearing and petitioner moved to advance the case to an earlier hearing date.

The court of appeals then set a court's motion on the merits to be heard on February 20, 1987.

In petitioner's response to court's

motion on the merits, petitioner noted that, under the allegations of plaintiff's complaint for injunction, it is possible for plaintiff to show that the new explanation for the movement of the air, upon which the complaint is based, is supported by plaintiff's personal experience of hearing the voice of God speak to plaintiff from out of the adjacent air, this experience indicating that the air possibly is God or part of God and blowing and moving by means of inherent life and will.

In the response, petitioner cited United States v. Ballard, 322 U. S. 78, 88 L. Ed. 1148, 64 S. Ct. 882 (1944), in which case it was held that the contention that Jesus Christ came down to earth and spoke to twentieth century humans was a valid religious belief and experience.

The court's motion on the merits

was heard on the trial court record, the briefs filed in the supreme court, appellant's response to court's motion on the merits and oral argument by appellant and counsel for respondent.

The questions regarding the jurisdiction of the trial court over the subject matter and the application of the doctrine of primary jurisdiction were raised in the court of appeals in the same manner they were raised in the trial court (pp.2-6, supra) since the trial court record was before the court of appeals.

The questions were also raised by the briefs of the parties.

In the brief of appellant, pp. 15, 16, petitioner contended that 49, Appendix U. S. C. #1506, as construed in Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976), granted the trial court jurisdiction of

the subject matter.

Petitioner contended that since the suit was one for injunction to prevent the hazard of falling objects (a familiar type of suit) and since there was no federal statute or regulation regarding the new explanation for the movement of the air, under the holding of Nader, petitioner's right of suit was preserved by #1506 and the trial court did have jurisdiction.

For the same reasons, petitioner contended that #1506, as construed in Nader v. Allegheny Airlines, Inc., supra, made inapplicable the doctrine of primary jurisdiction. (brief of appellant, pp. 16-18)

The court of appeals passed upon these questions by the commissioner's ruling granting motion on the merits entered March 4, 1987.

In this ruling, the court held that

the trial court lacked jurisdiction of the subject matter and that it had properly applied the doctrine of primary jurisdiction. (As noted earlier, the trial court did not give reasons in its order)

Petitioner filed a motion to modify ruling. Respondent filed a response to this motion.

On April 1, 1987, the court of appeals entered an order denying motion to modify.

On April 22, 1987, petitioner filed a petition for review with the Washington supreme court. Respondent filed an answer to petition for review.

The petition was denied on June 2, 1987.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the court below conflicts with Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48

L. Ed.2d 643, 96 S. Ct. 1978 (1976) construing 49, Appendix U. S. C. #1506.

In Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976), 49, Appendix U. S. C. #1506 was construed. #1506 is the savings clause of the federal aviation program (formerly federal aviation act). #1506 reads as follows:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

In Nader, suit was brought for fraudulent misrepresentation based on the airline's alleged failure to inform plaintiff in advance of its deliberate overbooking practices. In holding that plaintiff's right of suit was preserved by #1506, the court said:

"The court in the present case, in

> contrast, is not called upon to substitute its judgment for the agency's on the reasonableness of a rate--or, indeed, on the reasonableness of any carrier practice. There is no Board requirement that air carriers engage in overbooking or that they fail to disclose that they do so.....Under the circumstances, the common-law action and the statute are not 'absolutely inconsistent' and may coexist, as contemplated by #1106 (#1506)". 426 U. S. at 299

Thus, it was held that, since there was no regulation regarding the over-booking practices, the common law suit was not inconsistent with the federal aviation act.

In the present case, a closely analogous situation is involved. Here, petitioner brought suit for an injunction requiring respondent to notify the crews of planes to be sold by it of a new explanation for the movement of the air.

There is no statute or regulation regarding the new explanation. Thus,

under the holding of Nader, petitioner's suit for injunction may coexist with the federal aviation program.

The court below, in the commissioner's ruling granting motion on the merits, said: "Here, there would be a conflict if a state court were to order Boeing to give the instructions Campbell wishes, when the federal aviation agency (FAA) has declined to issue such a rule."

Petitioner contends that this holding conflicts with that of Nader, supra. Nader in fact held that, where there was no regulation regarding the subject of the suit, there was no conflict with the federal aviation act and the common law suit was preserved.

Here, the decision of the federal aviation administration not to issue a rule regarding the new explanation for the movement of the air merely left unchanged the fact that there is no

statute or regulation regarding the new explanation. As shown earlier, where there is no such statute or regulation, the right of suit is preserved under #1506.

In Columbia Broadcasting System v. U. S., 316 U. S. 407, 86 L. Ed. 1563, 62 S. Ct. 1194 (1942), the court said:

> "Of course, the Commission was at liberty to follow a wholly different procedure. Instead of proclaiming general regulations applicable to all licenses, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them." 316 U. S. at 421

Thus, an agency has discretion whether or not to issue a rule. An agency may decline to issue a rule and afterwards apply the principle sought to be set forth in the rule on a later

case to case basis.

Thus, the decision of an agency not to issue a rule is not determinative of the validity of the principle sought to be set forth in the rule and, here, the decision of the federal aviation administration not to issue a rule regarding the new explanation for the movement of the air is not controlling with respect to the validity of said explanation.

Therefore, contrary to the holding of the court below, the decision of the federal aviation administration not to issue a rule presents no conflict with the instructions sought by petitioner's complaint for injunction.

Further, as shown earlier, prior to bringing suit, petitioner petitioned the U. S. secretary of commerce for a rule respecting the new explanation. This was done because the commerce department

includes the national weather service, 15 U. S. C. #311-329.

The petition was referred to the transportation department. Afterwards, the federal aviation administration, a part of the transportation department, declined to issue the rule.

In C. A. B. v. Delta Airlines, Inc., 367 U. S. 316, 6 L. Ed.2d 869, 81 S. Ct. 1611 (1961), where an agency failed to follow statutory procedure in entering an order, the order was invalid.

In the present case, the petition for a rule was not filed with nor pursuant to the procedure of the federal aviation administration. Hence, the refusal to issue a rule may be subject to question.

For these reasons, under 49, Appendix U. S. C. #1506, the trial court did have jurisdiction over the subject matter.

In this case, the complaint prays

that respondent be required to instruct the crews of planes to be sold by respondent that fly over Seattle regarding the possibility that the air, by intelligent, controlled, voluntary movement, could shift the path of a plane.

In Fleming v. Delta Airlines, 359 F. Supp. 339 (S. D. N. Y. 1973), a passenger sustained injuries when the wind (turbulence) bounced an airliner about. He sued, contending the airlines should have notified him of the storm of which the airlines had advance notice.

The court allowed recovery saying:

> "However, it (the airline) owes its passengers the duty to share with them information indicating such serious weather disturbances, so that they can choose for themselves whether they are physically and emotionally capable of undertaking the trip and wish to do so." 359 F. Supp. at 341

Since the complaint here involves similar facts (the possibility the air voluntarily could shift a plane about),

the trial court had jurisdiction over the subject matter.

The doctrine of separation of church and state does not deprive the court of jurisdiction.

15 U. S. C. #313 provides:

> "The Secretary of Commerce shall have charge of..... the distribution of meteorological information in the interests of agriculture and commerce, and the taking of such meteorological observations as may be necessary to establish and record the climatic conditions of the United States, or as are essential for the proper execution of the foregoing duties."

This statute authorizes inquiries into the cause of the air's movement and, thusly, a new explanation for the movement of the air. Aristotle's theories of the movement of the air, long followed, were rejected in the 19th century. (See Encyclopedia Americana, Meteorology, 1987)

As a result, if the inquiry into the cause of the air's movement reveals the possibility the air is alive, an intelligent

form of life, God or part of God, and blowing and moving by means of inherent life and will, this possibility is a statutory exception to the doctrine of separation of church and state.

Hence, the trial court had jurisdiction over the subject matter of the complaint.

The ruling of the court below, Appendix p. a5 , states: "In deciding it had no subject matter jurisdiction, the trial court applied the doctrine of primary jurisdiction..... Here, the court applied the doctrine and deferred to the expertise of the FAA."

In fact, as mentioned earlier, the order of the trial court did not say this since the order did not include reasons for the decision.

In Nader v. Allegheny Airlines, Inc., 426 U. S. 290, supra, the application of the doctrine of primary jurisdiction was considered.

At 426 U. S. 304, the court said:

> "Petitioner seeks damages for respondent's failure to disclose its overbooking practices. He makes no challenge to any provision in the tariff, and indeed there is no tariff provision or Board regulation applicable to disclosure practices. (footnote omitted) Petitioner also makes no challenge, comparable to those made in (citations omitted), to limitations on common-law damages imposed through exculpatory clauses included in a tariff..... The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case."

Here, petitioner contends that, under the holding of Nader, primary jurisdiction is not applicable to the complaint.

The present suit is for an injunction to prevent the hazard of falling objects. This is a familiar case. See Harris Stanley Coal & Land Co. v. Chesapeake &

O. Ry. Co., 154 F.2d 450 (1946) where an injunction was granted to avoid the possibility of falling material from defendant's mine down upon plaintiff's tracks.

Petitioner contends that the instant case involves questions that are proper for a court to decide and that there is nothing that should be referred to an administrative body.

Since this case arises on a motion to dismiss, the facts are the allegations of the complaint. In the trial court, petitioner also showed that he had, prior to suit, petitioned for issuance of a rule regarding the new explanation for the movement of the air.

In addition, in the court below, petitioner showed that, under the allegations of plaintiff's complaint for injunction, it is possible for plaintiff to show that the new explanation for the

movement of the air, upon which the complaint is based, is supported by plaintiff's personal experience of hearing the voice of God speak to plaintiff from out of the adjacent air, this experience indicating that the air possibly is God or part of God and blowing and moving by means of inherent life and will.

Petitioner cited United States v. Ballard, 322 U. S. 78, 88 L. Ed. 1148, 64 S. Ct. 882 (1944) in which it was held that the claim that Jesus Christ appeared on earth and talked to twentieth century persons was a valid religious belief and experience.

The complaint alleges (undenied on the motion to dismiss) that many planes built by respondent daily fly over Seattle without the crews being informed of the new explanation.

The complaint further alleges that the new explanation involves the

possibility that the air could, by intelligent, controlled movements, shift the path of a plane. A reasonable inference from this allegation is that the air could, by controlled, voluntary movements, force a plane down to an exact place on the earth.

The complaint also alleges that petitioner lives in Seattle and prays that respondent be required to notify the crews of planes to be sold by respondent in the future of the new explanation.

Petitioner maintains that these undenied factual allegations set forth issues for the court, not an administrative agency, to decide. Nader v. Allegheny Airlines, Inc., supra.

In Fleming v. Delta Airlines, 359 F. Supp. 339, the court, not an agency, considered the question whether damages could be recovered for injuries

received when the wind shifted and jostled an airliner.

Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co., 154 F.2d 450, explains the standards to be applied when an injunction is sought to prohibit the danger of falling objects.

These are the standards to be applied in the present case seeking to enjoin the hazard of falling planes in Seattle where petitioner lives.

Nader, supra, held that, where the standards to be applied are within the conventional competence of the courts, primary jurisdiction is not pertinent.

Since the standards to be applied here are those set forth in Harris Stanley Coal & Land Co., supra, under the holding of Nader, primary jurisdiction is not relevant.

The fact that a new explanation for the movement of the air is involved does

not alter the situation.

The only question presented about the new explanation is whether the crews should be instructed of it. The nature and existence of the new explanation are not denied by the motion to dismiss.

In fact, the new explanation is not subject to denial. It is a physical possibility of the atmosphere that the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will. (See Encyclopedia Americana, Meteorology, 1987 with reference to the possibility of a new explanation for the movement of the air.)

Petitioner maintains that the question whether the crews should be informed of the new explanation is a question for the court rather than an administrative body.

In Harris Stanley Coal & Land Co. v.

Chesapeake & O. Ry. Co., 154 F.2d 450, at 453, the court said:

> "The primary test of equitable jurisdiction to grant a permanent injunction is whether there does or does not exist an adequate legal remedy for the injury sought to be prevented."

> "The pictorial exhibits graphically depict the steep face of the cliff behind which the pillars stand, and its proximity to the railroad tracks, and it is indeed bold prophecy which denies the threatened danger. A court of equity will not gamble with human life, at whatever odds, and for loss of life there is no remedy that in an equitable sense is adequate."

These tests are the ones to used here in deciding whether an injunction should be granted requiring respondent to notify the crews of the new explanation.

The precise issue here is whether the possibility the air could, by controlled, voluntary movements, blow or force a plane down to an exact spot in Seattle is such a serious possibility that the crews

should be notified of the possibility. (Informed of it, the crews possess the possibility of taking adaptive action.)

Applying the tests of Harris Stanley Coal & Land Co., supra, the question is whether the planes sold by respondent flying over Seattle with the crews unaware of the undeniable possibility that the air could, by voluntary, controlled movements, blow or force a plane down to an exact place in Seattle constitute such a threat to petitioner's life as to render the remedy at law inadequate and justify the grant of an injunction.

Therefore, since the decision of the case involves the application of the tests set forth in Harris Stanley Coal & Land Co., supra, it is clear that the questions are within the conventional competence of the courts.

Also, here there are no statutes or

regulations respecting the new explanation.

Under the holding of Nader v. Allegheny Airlines, Inc., supra, when the standards to be applied to a case are within the conventional competence of the courts and there is no regulation about the subject of the suit, primary jurisdiction is inapplicable. Thusly, it is not pertinent in the present case.

Therefore, under the holding of Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976) construing 49, Appendix U. S. C. #1506, the trial court had jurisdiction of the subject matter of the complaint and primary jurisdiction was not applicable.

A decision of the U. S. supreme court construing a federal statute is the supreme law of the land. U. S. v. Gilbert Associates, Inc., 345 U. S. 361, 97 L. Ed. 1071, 73 S. Ct. 701 (1953).

Thus, the decision of the court below conflicts with Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978 (1976) construing 49, Appendix U. S. C. #1506.

CONCLUSION

Because of the foregoing reasons and authorities, the ruling of the commissioner of the court of appeals of the state of Washington division one should be reversed and the case remanded to said court for further proceedings.

Gordon McLean Campbell

Petitioner

APPENDIX

In the court of appeals of the state of Washington division one

Gordon McLean Campbell, Appellant, v. The boeing company, Respondent.	)	No. 19318-0-I
	)	Commissioner's ruling granting motion on the merits

Gordon McLean Campbell appeals from dismissal of his claims against the boeing co. (boeing). The court has set a motion on the merits pursuant to RAP 18.14(a). The commissioner has considered the files and record, heard oral argument and has determined that the motion should be granted.

Facts

In March 1986 Campbell filed a complaint for injunction, seeking to require boeing to inform the crews of all airplanes which it sells that there is a new explanation for the movement of

al

the air, i.e. that "the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will." Campbell also alleged that his life was endangered by boeing's failure to so instruct, as the lack of information "increases the risk of falling airplanes in Seattle." Boeing moved pursuant to CR 12(b)(1) and 12(b)(6) for dismissal. The trial court dismissed the complaint with prejudice. Campbell appeals and presents two issues.

Issue

1. Does the trial court have subject matter jurisdiction over this complaint?

2. Did Campbell's complaint set forth a claim on which relief could be granted?

Criteria for determining whether to grant a motion on the merits

RAP 18.14(e) provides:

> A motion on the merits will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the.....commissioner will consider all relevant factors including whether the issues on review (1) are clearly controlled by settled law, (2) are factual and supported by the evidence, or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.

In applying these criteria, the commissioner determines that the issue presented is clearly without merit.

Decision

Campbell first argues that the trial court erred in concluding that it lacked subject matter jurisdiction to hear the complaint. He cites 49 U. S. C. #1506, which provides: "Nothing contained in this chapter shall in anyway abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such

remedies."

The United States supreme court has interpreted 49 U. S. C. #1506 to mean that where there is an irreconcilable conflict between the statutory scheme and the presence of common law remedies, the state court common law action must yield. Nader v. Allegheny Airlines, Inc., 426 U. S. 290, 48 L. Ed.2d 643, 96 S. Ct. 1978, 1984 (1976); see Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350 (1907). Here, there would be a conflict if a state court were to order Boeing to give the instructions Campbell wishes, when the Federal Aviation Agency (FAA) has declined to issue such a rule. The state court would then be in the position of injecting itself into the technical field of airline procedures, which are extensively regulated by the federal government. Thus, Campbell's common law

remedies must yield to the FAA regulations.

In deciding it had no subject matter jurisdiction, the trial court applied the doctrine of primary jurisdiction. Under that doctrine, which is concerned with promoting proper relationships between the courts and administrative agencies, Nader at 1986, the court may defer to the expertise of an agency which has a special competence over an issue. Nader at 1987; S. S. Kresge Co. v. Port of Longview, 18 Wn. App. 805, 809, 573 P.2d 1336 (1977). The application of the doctrine is within the sound discretion of the trial court, Kresge at 809; Kerr v. Department of Game, 14 Wn. App. 427, 542 P.2d 467 (1975). Here, the court applied the doctrine and deferred to the expertise of the FAA. Campbell has failed to establish this act was an abuse of discretion and this contention is without merit.

Campbell also argues that contrary

to the trial court's conclusion his complaint stated a claim on which relief could be granted. In a motion brought under CR 12(b)(6), factual allegations of the complaint must be accepted as true. Berge v. Gorton, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). Even if the facts as stated in Campbell's complaint were true, the trial court was correct in dismissing the complaint once it determined that it lacked jurisdiction. A trial court may be affirmed on any theory within the pleadings and proof. Wilkinson v. Smith, 31 Wn. App. 1, 639 P.2d 768 (1982). The trial court acted properly in dismissing the complaint. Now, therefore, it is hereby

ORDERED that the motion is granted and the trial court is affirmed.

Done this 4th day of March, 1987.

Jo Anne L. Tompkins

court commissioner

In the superior court of the state of Washington in and for the county of king

Gordon McLean Campbell, Plaintiff, vs. The boeing company, Defendant.	Civil no. 86-2-04846-4 Order granting motion to dismiss and strike complaint

Defendant the boeing company, having moved this court pursuant to rules 11 and 12(b) and (f) for an order striking the complaint and dismissing this action with prejudice, and the matter having come on for hearing based on the complaint and the briefs and arguments of the parties and counsel for the parties, and the court being fully advised in the premises, it is now hereby

Ordered, adjudged, and decreed that the complaint in the instant matter be and the same is hereby stricken; it is

Further ordered that the instant action be and the same is hereby dismissed with prejudice and at plaintiff's costs.

Dated this 22nd day of April, 1986.

Patricia Aitken

Superior court judge

Entered April 22, 1986

The supreme court of the state of Washington

Gordon McLean Campbell)
v.)
The Boeing Company)
)

No. 53869-7
Order number 161/176

Petition for review denied.

Entered June 2, 1987

The judgment or decree sought to be reviewed is the commissioner's ruling granting motion on the merits, pp. a1-a6 supra. Entered March 4, 1987

In the court of appeals of the state of Washington division I

Gordon McLean Campbell) Appellant,) v.) THE BOEING COMPANY,) Respondent.)	No. 19318-0-I ORDER DENYING MOTION TO MODIFY

Gordon McLean Campbell has filed a motion to modify the commissioner's ruling granting a motion on the merits and affirming the decision of the trial court. Respondent has filed a response to the motion to modify entitled "The Boeing Company's Opposition to Motion to Modify Ruling." A panel of this court has considered the matter pursuant to RAP 17.7 and In re Marriage of Wolfe, 99 Wn. 2d 531, 663 P.2d 469 (1983), and has determined that the motion should be denied for the reasons set forth in the commissioner's ruling. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 1st day of April, 1987.

Scholfield, CJ

Grosse, J. Webster, J

Entered April 1, 1987

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-236

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

GORDON McLEAN CAMPBELL,

Petitioner

v.

THE BOEING COMPANY,

Respondent

On Writ of Certiorari to the Washington State Court of Appeals

BRIEF OF THE BOEING COMPANY IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether an individual's state common law cause of action to require flight procedures and air transport pilot training in addition to, or in conflict with, requirements of the Federal Aviation Act and pursuant regulations is barred by (1) the doctrine of primary jurisdiction or (2) the doctrine of federal preemption.

STATEMENT PURSUANT TO RULES 28.1 AND 34.1(b)

All parties to this proceeding are listed in the caption. Respondent The Boeing Company is a publicly held company.

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COUNTERSTATEMENT OF THE CASE

Petitioner unsuccessfully sought from the Washington State courts an injunction to compel Respondent The Boeing Company, the world's largest manufacturer of commercial jet transports, to instruct its customers' flight crews in his novel and unorthodox theories of the movement of the air. Petitioner submits that the air may be an intelligent life form, perhaps even a deity, which moves of its own volition:

> The new explanation for the movement of the air is that the air possibly is alive, an intelligent form of life, God or part of God, and blowing and moving by means of inherent life and will. (Petition at 3)

Petitioner asserts that aircraft operating in ignorance of his theories pose a personal risk which would, apparently, be neutralized or manageable

if Respondent were ordered to instruct flight crews of this "new explanation of the movement of the air." (Petition at 4)

The Superior Court of the State of Washington for King County (Seattle) dismissed Petitioner's action on April 22, 1986. (Petition at a7) The dismissal was affirmed by the Court of Appeals of the State of Washington, Division I (Seattle), on April 1, 1987. (Petition at a1 & a9) Discretionary review was denied by the Supreme Court of the State of Washington on June 2, 1987. (Petition at a8)

SUMMARY OF ARGUMENT

1. Petitioner has not, and cannot, identify federal questions of importance

or controversy sufficient to warrant certiorari.

2. The relief sought by Petitioner's state common law action is within the exclusive authority and special competence of the U.S. Department of Transportation and the Federal Aviation Administration. Under the well-established doctrine of primary jurisdiction, such relief should be awarded or denied only by the expert federal agency to preserve regulatory uniformity and proper technical standards.

3. The position advanced by Petitioner is in conflict with federal substantive laws and regulations duly enacted by Congress, the U.S. Department of Transportation, and the Federal Aviation Administration. Accordingly, Petitioner's state common law cause of action is preempted by federal law.

ARGUMENT AGAINST ALLOWANCE OF WRIT

Respondent The Boeing Company is the world's largest manufacturer of large commercial jet transports, such as the Boeing 727 and 747. Integral to the design, manufacture, sale, and support of these aircraft is Boeing's flight training program. This program, which is regulated and certified by the Federal Aviation Administration ("FAA") under 14 C.F.R. Pt. 121, trains and certifies, in conjunction with the FAA and comparable foreign civil aviation authorities, commercial airline pilots in the United States and throughout the world.

By the Writ sought herein, Petitioner would have reinstated his state court action to advance his

peculiar notions of aviation and flight safety management in competition with the comprehensive and authoritative regulation of the United States Department of Transportation and the FAA. Specifically, Petitioner would have his unusual theories of meteorology, atmospherics, and aeronautics included in or substituted for those in the pilot training curriculum required by the FAA. The Washington State courts properly concluded they lacked subject matter jurisdiction to entertain Petitioner's claims.

While Petitioner's factual allegations are unusual, the disposition below of his action is unremarkable and fully in accord with settled federal law regarding the primary jurisdiction of expert federal agencies and the

preemptive force of statutes and regulations enacted pursuant to the plenary authority of Congress under the Commerce Clause of the United States Constitution. Accordingly, Petitioner has failed utterly to raise issues of significant import or controversy warranting a Writ of Certiorari.

I. THE APPLICATION OF THE SETTLED DOCTRINE OF PRIMARY JURISDICTION IN THE INSTANT MATTER ADVANCES NATIONAL REGULATORY OBJECTIVES AND PRESENTS NO ISSUES WARRANTING CERTIORARI.

The doctrine of primary jurisdiction, which concerns "proper relationships between courts and administrative agencies charged with particular regulatory duties," Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303 (1976), quoting United States v. Western Pac. R.R. Co., 352 U.S. 59, 63 (1956), provides that courts should

normally defer to an administrative agency which has initial or exclusive jurisdiction of the subject matter of an action. Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165, 168-69 (D.C. Cir. 1976); K. Davis, Administrative Law Text § 19.01 (3d ed. 1972). The doctrine is grounded in two significant rationales: (1) the need for regulatory uniformity and (2) the necessity of a determination by a specialized, expert agency. Kappelmann, supra, 539 F.2d at 169.

Petitioner's efforts to dictate the direction and content of elements of the nation's integrated air commerce structure through state court litigation collide head-on with matters already strictly and comprehensively regulated by the FAA. That collision triggers the well-established doctrine of primary

jurisdiction in a thoroughly predictable and appropriate fashion.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301 et seq., together with the pursuant regulations promulgated by the Secretary of Transportation and the FAA Administrator, see generally 14 C.F.R. Pts. 1-139 (1986), provide a comprehensive and exclusive scheme of federal regulation of all aspects of aviation in the United States. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 627-28, 633-34 (1973); see Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J. concurring).

In particular the Act provides that the Secretary of Transportation "is empowered and it shall be his duty" to prescribe the minimum standards for

aircraft performance and other operational practices and procedures, all in the interest of the "highest possible degree of safety." 49 U.S.C. § 1421 (a)-(b). Under the Act the FAA "Administrator is . . . directed to prescribe air traffic rules and regulations governing the flight of aircraft [and] the protection of persons and property on the ground . . . ." 49 U.S.C. § 1348(c).

The Act further empowers the Secretary of Transportation to issue airman (pilot) certificates and licenses. 49 U.S.C. § 1422. Regulations issued pursuant to the Act by the Secretary and the FAA Administrator, 14 C.F.R. Pts. 61-65 (1986), prescribe in exhaustive detail the qualifications and instruction curriculum for pilot certification and

licensure. For Airline Transport Pilot ratings, which are required for the operation of Boeing aircraft, 49 U.S.C. § 1422(c), the FAA requires instruction in and adherence to scientific principles of meteorology, atmospherics, and aeronautics which are directly contrary to Appellant's new explanation for the movement of the air.[1]

The instant case thus presents a compelling circumstance for the

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[1] An applicant for an Airline Transport Pilot rating must pass an FAA written test demonstrating knowledge of meteorology and atmospherics, including cloud forms, weather fronts, icing, and upper-air winds. The applicant is also tested on his or her knowledge of the National Weather Service Federal Meteorological Handbook No. 1, as amended. 14 C.F.R. § 61.153 (1986). Given the apparent rejection by the U.S. Commerce and Transportation departments of Appellant's petition for rulemaking on his new explanations of air movement, (Petition at 6, 14-17), it is reasonable to infer that Appellant's theories are inconsistent with those prescribed by the National Weather Service and the FAA.

application of the doctrine of primary jurisdiction. Courts, and in particular a state court of general jurisdiction, which, by definition, lack both the specialized expertise and the regulatory perspective of the FAA, soundly exercise their discretion by withholding any equitable jurisdiction in favor of a fully informed and uniform administrative resolution. This principle is well-illustrated in a closely analogous context in Kappelmann v. Delta Air Lines, 539 F.2d 165, 168-69 (D.C. Cir. 1976).

In Kappelmann, plaintiff alleged he had been exposed to radioactive cargo while a passenger on a Delta flight. Plaintiff sought, inter alia, an injunction requiring Delta to notify its passengers of the transport of radioactive materials. 539 F.2d at 168.

The United States Court of Appeals for the District of Columbia Circuit held that an injunction which, in purpose and effect, was judicial rulemaking against one regulated company, invoked "a doctrine in the nature of primary jurisdiction more strongly than" where the doctrine is more traditionally applied. Id. at 169 (emphasis in original). The court dismissed plaintiff's action for an injunction, stating:

> The injunction which appellants would have the court fashion here would in effect constitute a regulation covering one phase of the interstate transportation of one group of hazardous materials on one airline. Such determinations are better made on an industry-wide basis in an agency rulemaking proceeding, and this indeed is the choice which Congress has made . . . . Id. at 171.

As did his counterpart in Kappelmann, Petitioner in the instant

matter is seeking legislation by injunction within an area already strictly and pervasively regulated by an expert and specialized federal agency. It is clear that Congress has sought uniformity and exclusivity of regulation by empowering the Secretary of Transportation and the FAA Administrator, and no others, to issue technical rules of general application governing flight operations and pilot qualifications. 49 U.S.C.§§ 1348(c), 1421-22.[2]

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2 Ironically, even assuming Appellant's theories should be regarded with more than dark amusement, an order in conformity with his prayer for relief would likely degrade flight safety in Seattle and elsewhere because commercial air carriers, general aviation and military flight operations, FAA air traffic controllers, and pilots using non-Boeing aircraft would observe different, and conflicting, methods and procedures.

Petitioner has represented that he indeed did file a petition for rulemaking with the U.S. Commerce Department, a petition which was ultimately referred to and rejected by the FAA. (Petition at 6, 14-17). While Petitioner's petition for rulemaking concedes, therefore, the applicability of the doctrine of primary jurisdiction, Appellant argues that his initial, though failed, resort to an administrative agency has satisfied the constraints of the primary jurisdiction doctrine and now authorizes the instant action and the relief sought therein. He relies for this proposition on the Federal Aviation Act's savings clause, 49 U.S.C. § 1506. As is explained more fully below, Petitioner has completely misapprehended the purpose and effect of

section 1506 and the preemptive force of the Federal Aviation Act and its pursuant regulations.

Petitioner regards section 1506 as a substantive warrant of trial court jurisdiction for his benefit. In that regard he selectively relies upon Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), where consumer activist Ralph Nader sued a carrier for common law fraud because he was bumped from an overbooked airline flight without notice of the overbooking practice. This Court held that Nader's tort action could proceed directly and without preliminary resort to proceedings before the Civil Aeronautics Board to determine if overbooking was an unfair or deceptive practice under the Federal Aviation Act. This Court found that section 1506, the identical savings clause relied upon by Appellant, did indeed

preserve Nader's common law tort claim because it was not irreconcilable with the statutory scheme. 426 U.S. at 299-300.

In contrast, however, the relief sought by Petitioner in this case is wholly at odds with the highly technical and uniform statutory and administrative system governing flight operations and airman certification. The Nader Court anticipated that eventuality as well, observing that section 1506 cannot be read literally or absolutely. This Court stated that a savings clause such as section 1506 is designed to preserve those rights and remedies which predate and which are not inconsistent with the statutory scheme. 426 U.S. at 299 & n.9. Quoting from Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S.

426 (1907), this Court held that a savings clause

> cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. 426 U.S. at 299.

Petitioner here seeks rights and remedies which, in the instant matter, cannot coexist logically or safely within the regulatory structure erected by the Federal Aviation Act. Accordingly, Petitioner has failed to demonstrate a sufficient basis for allowance of a Writ of Certiorari.

II. THE STATE COURTS' DISCLAIMERS OF SUBJECT MATTER JURISDICTION ARE IN ACCORD WITH SETTLED FEDERAL PREEMPTION DOCTRINE AND DO NOT WARRANT CERTIORARI.

Notwithstanding Petitioner's contention that his preliminary, though failed, resort to the administrative

process was effective in rebutting the primary jurisdiction defense, it is absolutely clear that a state court acting in a judicial or quasi-legislative mode is constitutionally disabled by the doctrine of federal preemption from affording Petitioner the relief he now seeks.

Article VI of the United States Constitution provides that federal laws "shall be the supreme Law of the Land" and that "the Judges in every State shall be bound thereby . . . ." Article I, Section 8 of the Constitution vests in Congress plenary authority over interstate and foreign commerce. It is long-settled that congressional enactments pursuant to the Commerce Clause preempt any contrary or inconsistent state regulation unless the federal legislation expressly or by

implication tolerates such state regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Accord, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 627-28, 633-34 (1973). That preemption is starkly evident in this case.

First, the authority to regulate the areas of aviation material to the instant matter are vested exclusively in federal authorities. 49 U.S.C. §§ 1348, 1421-22; see generally 14 C.F.R Pts. 1-139 (1985).

Second, the scheme of federal regulation is so pervasive that there is no opportunity remaining for the direct involvement in the respects sought by Petitioner. Justice Jackson, in his concurring opinion in Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944), summarized the wholesale

federal occupation of the aviation field as follows:

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government. 322 U.S. at 303 (concurring opinion) (cited with approval in Lockheed Air Terminal, supra, 411 U.S. at 633-34).

Further to this point, this Court addressed the power to control airport noise pollution, a concern analogous to (though less dramatic than) Petitioner's

safety concerns in this case, in Lockheed Air Terminal, supra. This Court noted that the Federal Aviation Act requires a delicate balance among issues of flight safety, efficiency, and the protection of persons on the ground. This Court held that

> [t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled. 411 U.S. at 638-39.

While the Federal Aviation Act contains a savings clause, 49 U.S.C. § 1506, it is clear from the preceding discussion that common law and statutory rights and remedies antedating and conflicting with that Act have not been preserved. Nader v. Allegheny Airlines, Inc., supra.

Petitioner has failed to demonstrate federal issues of significance or

controversy sufficient to warrant a Writ of Certiorari. Instead, Petitioner's action has provoked application of settled doctrines protective of federal supervision of national interests. Those interests are served only by dismissing the Petition or granting the further relief sought by Respondent.

CONCLUSION

Petitioner has not, and cannot, demonstrate grounds sufficient to warrant a Writ of Certiorari, and the allowance of such a Writ should be denied. Moreover, consideration of the merits of Petitioner's cause of action, the arguments advanced in opposition, and the totality of the circumstances surrounding this action supports, and Respondent hereby urges, summary

disposition on the merits under this Court's Rule 23.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28, the Brief of The Boeing Company in Opposition to Grant of Writ of Certiorari was served this 14th day of September, 1987, upon Petitioner Gordon McLean Campbell by mailing three (3) copies thereof through the United States mail, with first class postage prepaid, to Petitioner at his address of record.

Theodore J. Collins

APPENDIX OF AUTHORITIES

U.S. CONSTITUTION

Article I, Section 8

The Congress shall have Power . . . to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes . . . .

Article VI

. . .

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding . . . .

FEDERAL AVIATION ACT

49 U.S.C. § 1348 Airspace control and facilities

(a) Use of airspace

The Secretary of Transportation is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under

such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

(b) Air navigation facilities; performance of functions by Federal department or agency

The Secretary of Transportation is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic. The Secretary may, subject to such regulations, supervision, and review as he may prescribe, from time to time make such provision as he shall deem appropriate authorizing the performance by a Federal department or agency, with the consent of the department or agency, of any function under this subsection.

(c) Air traffic rules

The Secretary of Transportation is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property of the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

(d) Applicability of administrative procedure provisions

In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the Secretary of Transportation shall be subject to the provisions of subchapter II of chapter 5 of Title 5, notwithstanding any exception relating to military or naval functions in section 553 of Title 5.

(e) Exemptions

The Secretary of Transportation from time to time may grant exemptions from the requirements of any rule or regulation prescribed

under this subchapter if he finds that such action would be in the public interest.

(f) Exception for military emergencies

When it is essential to the defense of the United States because of a military emergency or urgent military necessity, and when appropriate military authority so determines, and when prior notice thereof is given to the Secretary of Transportation, such military authority may authorize deviation by military aircraft of the national defense forces of the United States from air traffic rules issued pursuant to this subchapter. Such prior notice shall be given to the Secretary of Transportation at the earliest time practicable and, to the extent time and circumstances permit, every reasonable effort shall be made to consult fully with the Secretary of Transportation and to arrange in advance for the required deviation from the rules on a mutually acceptable basis.

49 U.S.C. § 1421 Powers and duties of Secretary of Transportation

(a) Minimum standards; rules and regulations

The Secretary of Transportation is empowered and it shall be his

duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Secretary of Transportation, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretary of

Transportation may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Secretary of Transportation may find necessary to provide adequately for national security and safety in air commerce.

(b) Consideration of needs of service; classification of standards, rules, regulations, and certificates

In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Secretary of

Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Secretary of Transportation may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Secretary of Transportation shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this subchapter.

(c) Exemptions

The Secretary of Transportation from time to time may grant exemptions from the requirements of any rule or regulation prescribed

under this subchapter if he finds that such action would be in the public interest.

. . .

49 U.S.C. § 1422 Airman Certificates

(a) Authorization to issue

The Secretary of Transportation is empowered to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft.

(b) Application; issuance or denial; petition for review, hearing; determination; issuance of certificates to aliens; revocation; exceptions

(1) Any person may file with the Secretary of Transportation an application for an airman certificate. If the Secretary of Transportation finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special

examinations, tests of physical fitness, and other matters as the Secretary of Transportation may determine to be necessary to assure safety in air commerce. Except in the case of persons whose certificates are, at the time of denial, under order of suspension or whose certificates have been revoked within one year of the date of such denial, any person whose application for the issuance or renewal of an airman certificate is denied may file with the National Transportation Safety Board a petition for review of the Secretary of Transportation's action. The National Transportation Safety Board shall thereupon assign such petition for hearing at a place convenient to the applicant's place of residence or employment. In the conduct of such hearing and in determining whether the airman meets the pertinent rules, regulations, or standards, the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation. At the conclusion of such hearing, the National Transportation Safety Board shall issue its decision as to whether the airman meets the pertinent rules, regulations, and standards and

the Secretary of Transportation shall be bound by such decision: Provided, That the Secretary of Transportation may, in his discretion, prohibit or restrict the issuance of airman certificates to aliens, or may make such issuance dependent on the terms of reciprocal agreements entered into with foreign governments.

2(A) Except as provided in subparagraphs (B) and (C), the Administrator shall not issue an airman certificate to any person whose airman certificate has been revoked under subsection (c) of section 1429 of this title during the five-year period beginning on the date of such revocation.

(B) The Administrator may issue an airman certificate to any such person before the end of such five-year period (but not before the end of the one-year period beginning on the date of such revocation) if, in addition to the findings required by paragraph (1), the Administrator determines (i) that revocation of the certificate for such five-year period would be excessive considering the nature of the offense or the act committed and the burden which revocation

places on such person, or (ii) that revocation of the certificate for such five-year period would not be in the public interest. The determinations under clauses (i) and (ii) of the preceding sentence shall be within the discretion of the Administrator and any such determination or failure to make such a determination shall not be subject to administrative or judicial review.

(C) In any case in which the Administrator has revoked an airman certificate of a person under section 1429(c)(1) or (2) of this title as a result of any activity and--

> (i) such person is subsequently acquitted of all charges contained in an indictment or information which relate to controlled substances and which arise from such activity; or
>
> (ii) in the case of a revocation under section 1429(c)(1) of this title, the judgment of conviction on which the revocation is based is reversed on appeal;

the Administrator shall issue an airman certificate to such person if such person is otherwise qualified to serve as an airman under this section.

(c) Form and recording

Each certificate shall be numbered and recorded by the Secretary of Transportation; shall state the name and address of, and contain a description of, the person to whom the certificate is issued; and shall be entitled with the designation of the class covered thereby. Certificates issues to all pilots serving in scheduled air transportation shall be designated "airline transport pilot" of the proper class.

49 U.S.C. § 1506 Remedies not exclusive

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but he provisions of this chapter are in addition to such remedies.

CODE OF FEDERAL REGULATIONS

14 C.F.R. § 61.153 (1986) Airplane rating: Aeronautical knowledge

An applicant for an airline transport pilot certificate with an

airplane rating must, after meeting the requirements of §§ 61.151 (except paragraph (a) thereof) and 61.155, pass a written test on--

(a) The sections of this part relating to airline transport pilots and Part 121, Subpart C of Part 65, and §§ 91.1 through 91.9 and Subpart B of Part 91 of this chapter, and so much of Parts 21 and 25 of this chapter as relate to the operations of air carrier aircraft;

(b) The fundamentals of air navigation and use of formulas, instruments, and other navigational aids, both in aircraft and on the ground, that are necessary for navigating aircraft by instruments;

(c) The general system of weather collection and dissemination;

(d) Weather maps, weather forecasting, and weather sequence abbreviations symbols, and nomenclature;

(e) Elementary meteorology, including knowledge of cyclones as associated with fronts;

(f) Cloud forms;

(g) National Weather Service Federal Meteorological Handbook No. 1, as amended;

(h) Weather conditions, including icing conditions and upper-air winds, that affect aeronautical activities;

(i) Air navigation facilities used on Federal airways, including rotating beacons, course lights, radio ranges, and radio marker beacons;

(j) Information from airplane weather observations and meteorological data reported from observations made by pilots on air carrier flights;

(k) The influence of terrain on meteorological conditions and developments, and their relation to air carrier flight operations;

(l) Radio communication procedure in aircraft operations; and

(m) Basic principles of loading and weight distribution and their effect on flight characteristics.